Supreme Court, U.S.
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No. 96-1417

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CARGILL, INCORPORATED,

Petitioner,

v.

PARSLEY DAIRY FARM,
A TEXAS GENERAL PARTNERSHIP,
AND ITS PARTNERS, JOE PARSLEY, MARTHA
PARSLEY, MICHAEL PARSLEY, JEFFREY
PARSLEY and JOANN PARSLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

M. KEITH DOLLAHITE
HARDY & ATHERTON, P.C.
909 ESE Loop 323
Suite 750
Tyler, Texas 75701
(903) 561-8400
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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QUESTION PRESENTED

In its petition for a writ of certiorari, Cargill presents this question:

Should this Court permit the Fifth Circuit to deny rehearing without explanation of this case which is in federal court on diversity jurisdiction, when pending rehearing the state court of last resort issued an opinion addressing the same substantive issue and, holding the opposite of the Fifth Circuit?

LIST OF ALL PARTIES

Petitioner

Cargill, Incorporated
Cargill Grain Division

(See also Petitioner's list of Petitioner's affiliates)

Attorneys

James Thomas Foley
Susan Colley
Foley & Colley, P.C.
404 First Place
Tyler, Texas 75702
(903) 593-8883
(903) 593-1099 (Facsimile)

Deborah J. Race
6101 South Broadway
Suite 500
Tyler, Texas 75703
(903) 561-1600
(903) 581-1071 (Facsimile)

Respondents

Parsley Dairy Farm
Joe Parsley
Martha Parsley
Michael Parsley
Jeffrey Parsley
JoAnn Parsley

Attorneys

John C. Hardy
M. Keith Dollahite
Hardy & Atherton, P.C.
909 ESE Loop 323
Suite 750
Tyler, Texas 75701
(903) 561-8400
(903) 561-8228 (Facsimile)

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OPINIONS AND ORDERS BELOW

The United States District Court for the Eastern District of Texas denied Cargill's request for arbitration (see order reprinted in Cargill's appendix at 1-A). The United States Court of Appeals for the Fifth Circuit affirmed the

district court in an unpublished opinion (see opinion reprinted in Cargill's appendix at 2-A). The Fifth Circuit denied Cargill's petition for rehearing (see order reprinted in Cargill's appendix at 9-A).

JURISDICTION

On November 8, 1996, the United States Court of Appeals for the Fifth Circuit issued its opinion. On December 16, 1996, the Fifth Circuit denied Cargill's petition for rehearing. On March 11, 1997, Cargill's petition for a writ of certiorari was docketed. The court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Federal Arbitration Act ("FAA") governs this case and provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2. No other constitutional provision, treaty, statute, ordinance, or regulation is involved.

STATEMENT OF THE CASE

This case arises under diversity jurisdiction. Martha Parsley needed whole cottonseed to feed to the cows at her family's dairy near Troup, Texas. Martha called a

Cargill salesman in Minneapolis, Minnesota, asked about buying 500 tons of whole cottonseed, and reached an oral argument on the price, quantity, dates of delivery, and quality of the whole cottonseed that Cargill agreed to sell and deliver to the Parsleys. Arbitration was never discussed, and the Parsleys never intended to submit any dispute with Cargill to arbitration. Cargill had already bought a supply of cottonseed from Armistead Gin Co., Inc. in Coushatta, Louisiana. Cargill had truckers haul the cottonseed from Coushatta, Louisiana and deliver it to the Parsleys' dairy near Troup, Texas (R 7-14, 188, 226-234).

After Cargill began deliveries of the cottonseed, Martha received and signed Cargill's "Sale Confirmation and Contract" (R 234). The Parsleys' cows ate some of Cargill's cottonseed, got sick, stopped milking, and started dying. The Texas Feed & Fertilizer Control Service investigated, ordered Cargill to recall the cottonseed, and ruled that Cargill was in major violation of the Texas Feed Act for selling adulterated feed (R 293-320, 365-391). Thereafter, the Parsleys sued Cargill and Armistead Gin Co., Inc.

The subject of this appeal is an arbitration clause in Cargill's "Sale Confirmation and Contract," a non-negotiated, pre-printed, one page, adhesion document submitted unilaterally and after the fact by Cargill. Nothing on the front of Cargill's sale confirmation referred to arbitration. Paragraph 13 – under which Cargill claims a right to arbitration – was the barely readable, last paragraph on the back of the document. Turn it over, squint, and you may be able to read Paragraph 13, which states:

> The parties both agree that the sole remedy for resolution of all disagreements or disputes between

> the parties arising under this contract shall be arbitration proceedings under NGFA Arbitration Rules (or under the Rules specified on the front of this contract, if different). The decision and award determined by such arbitration shall be final and binding upon both parties.

The front of the sale confirmation specified NCPA rules – i.e., the rules of a trade association, the National Cottonseed Products Association.

The district court denied Cargill's request for arbitration based on the arbitration clause in its sale confirmation. 1-A. The Fifth Circuit affirmed. It held that even though the Parsleys were not members of the NCPA, the Parsleys became NCPA "Rule 93 non-members 'agreeable' to arbitrate under NCPA Rules" and were "deemed to have agreed to take all steps reasonably required by the NCPA Rules, explicitly or implicitly, to facilitate arbitration." 6-A. The Parsleys challenge this ruling in their conditional cross-petition for a writ of certiorari. However, the Fifth Circuit held that Cargill did not comply with the deadline under the NCPA rules for demanding arbitration and therefore cannot compel arbitration. Although the Fifth Circuit's analysis is incorrect, the Fifth Circuit's result of denying arbitration is correct. Accordingly, the Parsleys are satisfied with the Fifth Circuit's ultimate holding.

REASONS FOR DENYING THE PETITION

I. THE TEXAS SUPREME COURT'S DECISION IN *EZ PAWN CORPORATION v. MANCIAS* HAS NO EFFECT ON THE FIFTH CIRCUIT'S DECISION.

Cargill bases its petition for a writ of certiorari on the Supreme Court of Texas' opinion in *EZ Pawn Corporation v. Mancias.* 11-A. Cargill argues that in *Mancias,* the Texas Supreme Court addressed "the almost identical" question but ruled opposite to the Fifth Circuit in this case, and because this is a diversity case, the Texas Supreme Court's decision has some effect on this case. Cargill is wrong on all counts.

First, Cargill's argument that in *Mancias* the Texas Supreme Court was faced with the same question and ruled another way is mistaken. The cases are distinguishable. In *EZ Pawn Corporation v. Mancias,* the plaintiff entered into a specific arbitration agreement in connection with his employment for EZ Pawn. Under the arbitration agreement, the plaintiff and EZ Pawn mutually agreed to initiate arbitration of "any cognizable civil claim which may exist against the other . . . no later than 180 days after cognizable alleged cause of action accrues." 16-A. The Texas Supreme Court held that "[t]he agreement requires each party to initiate arbitration of that party's own claims against the other within 180 days after the claims accrue, it does not require a party to 'initiate' arbitration of the other party's claims." 16-A. By contrast, in this case there is no specific arbitration agreement, but rather only Cargill's sales invoice with a boilerplate clause purporting to incorporate NCPA arbitration rules. Under NCPA Rule 84, "[t]he member demanding an arbitration [Cargill] will be referred to as the complainant. The person against whom an arbitration is

demanded will be referred to as the defendant. Demand for an arbitration shall be made by letter or telegram addressed to the secretary of the association within 90 days after the complainant's right to arbitrate has accrued." Thus, unlike the agreement in *Mancias,* under NCPA Rule 84, as the party seeking arbitration, Cargill had the duty to demand arbitration within 90 days after the dispute arose. The operative facts of *Mancias* are significantly different than the operative facts of this case.

Second, even if the cases were not distinguishable, a federal court is not required to follow a state court's application of a federal statute. The Texas Supreme Court's decision in *EZ Pawn Corporation v. Mancias* has no impact on the Fifth Circuit's decision in this case. The Federal Arbitration Act governed Cargill's claim to an alleged right of arbitration with the Parsleys. 9 U.S.C. §1, *et seq.* The Erie doctrine does not require a federal court to apply a state court's interpretation of a federal statute. *See* 19 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4501 at p. 2 (2d ed. 1996) (federal court does not apply state law when federal statute governs matter). Any decision of a state court involving the Federal Arbitration Act is simply not binding on a federal court. The Fifth Circuit was not bound to follow any decision of the Texas Supreme Court regarding the Federal Arbitration Act, even if an identical question were involved. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,* 271 F.2d 402 (2d Cir. 1959), *cert. dism'd.* 364 U.S. 801 (1960); *Romnes v. Bache & Co.,* 439 F. Supp. 833 (W.D. Wis. 1977); *Griffin v. Semperit of America, Inc.,* 414 F. Supp. 1384 (S.D. Tex. 1976). Cargill mischaracterizes the Texas Supreme Court's decision when it argues that the decision was based on Texas substantive law. In fact, the basis was federal law under the FAA.

Cargill fails to acknowledge that the Texas Supreme Court examined the issue of waiver under the Federal Arbitration Act, not under state law, and cited federal cases on that issue. *EZ Pawn Corporation v. Mancias.* 16-A. Cargill does not establish a compelling reason for the Court to grant Cargill's petition.

II. THE FIFTH CIRCUIT'S DENIAL OF ARBITRATION IS CORRECT.

The Fifth Circuit's decision in this case is correct. Cargill received written notice of the Parsleys' claim from the Parsleys' attorney, which at the latest would have triggered any right to arbitration if Cargill had one. Did Cargill promptly demand arbitration? No. Instead, for 262 days, Cargill acted as though it had no right to arbitrate. The Parsleys filed their lawsuit, after which Cargill substantially invoked the judicial process by participating extensively in the proceedings in the district court before it asserted any alleged right to arbitration, as shown by this timeline:

No. Days	*Date*	*Activity in Litigation*
0	05/04/95	Cargill received written notice of the Parsleys' claim (R 189).
71	07/14/95	The Parsleys filed this lawsuit in state court (R 7).
78	07/21/95	Cargill was served with the lawsuit (R 1).
101	08/14/95	Cargill removed the case from state court to district court and demanded a jury. In its original answer, Cargill sought affirmative relief in the form of contribution and/or indemnity

No. Days	*Date*	*Activity in Litigation*
		against Armistead Gin, together with attorney's fees and court costs (R 1, 16, 20, 34, 36).
126	09/08/95	Cargill submitted cross questions to be propounded to the custodian of records for the Office of the Texas State Chemist in connection with a deposition on written questions (R 190).
131	09/13/95	Cargill made its initial disclosure (R 190).
133	09/15/95	Cargill was served with the Parsleys' initial disclosure (R 190).
151	10/03/95	Cargill noticed a deposition by written questions to the custodian of records for the Texas Veterinary Medical Diagnostic Lab ("TVMDL") (R 190).
174	10/26/95	Cargill served an amended notice to take a deposition by written questions of the custodian of records for the TVMDL (R 191).
182	11/03/95	Cargill served objections and answers to the Parsleys' first set of interrogatories (R 191).
184	11/06/95	Cargill filed a motion for protective order (R 191).
188	11/09/95	Cargill was served with Armistead Gin's initial disclosure (R 191).
199	11/20/95	Cargill served its first supplemental disclosure (R 191).
207	11/28/95	The district court granted Cargill's motion for protective order (R 191).

No. Days	*Date*	*Activity in Litigation*
209	11/30/95	Cargill filed its response to the Parsleys' motion for protection, in which Cargill asked the district court to order the Parsleys to produce certain documents and to find that the Parsleys waived certain privileges from disclosure (R 191).
220	12/11/95	Cargill served notice of a deposition by written questions on the Texas Dairy Herd Improvment Association (R 191).
252	01/12/96	Cargill served a notice of deposition by written questions on James Brown, DVM, the Parsleys' vet (R 191).
252	01/12/96	Cargill, with the other parties, filed a joint motion to postpone parties' depositions until after the management conference (R 191).
257	01/17/96	Cargill received the Parsleys' first amended initial disclosures. As of this date, through the disclosure process, Cargill had received 4,982 pages of documents from the Parsleys and 902 pages of documents from Armistead Gin (R 191).
262	01/22/96	Cargill, for the first time, asserted its claim to arbitration (R 171).
262	01/22/96	The district court held a pretrial management conference to discuss and set pretrial deadlines, a discovery plan, and a trial date (R 170).

It took the Parsleys hundreds of hours of work to sort and compile the records in compliance with their disclosure duties under the district court's local rules. Cargill received almost 5,000 pages of documents from the Parsleys, and hundreds of pages of documents from five other sources through depositions on written questions. Cargill would have received none of this information in NCPA arbitration: NCPA Rule 84 does not provide for any discovery, but rather requires each party to file a brief and its supporting evidence (R 100). On day 262 – after receiving a mountain of information it would not have otherwise gotten and causing significant prejudice to the Parsleys – Cargill, on the morning of the district court's pre-trial management conference, filed its motion requesting arbitration. Why did Cargill wait 262 days? Did circumstances beyond its control prevent it from claiming arbitration? No. Does Cargill explain why it took 262 days to claim arbitration? No. Cargill's apparent strategy was to remove this case to federal court, reap the benefits of the district court's disclosure procedure to force the Parsleys and others to give it information it could not otherwise get, and then attempt to force the Parsleys into arbitration. If the district court denied arbitration, then Cargill could appeal and delay the Parsleys' day in court, which Cargill has in fact done, unnecessarily delaying the trial of this case for over a year.

Assuming the Fifth Circuit was correct in determining that an abritration agreement existed between the parties by virtue of the NCPA rules – which the Parsleys challenge in their conditional cross-petition – NCPA Rule 84 bars Cargill's alleged right of arbitration. NCPA Rule 84 states that "[d]emand for an arbitration *shall be made* by letter or telegram addressed to the Secretary of the Association *within 90 days* after the complainant's right to

arbitrate has accrued" (R 200). The use of "shall" indicates that the 90 day deadline to demand arbitration is mandatory. Although the president of the NCPA may extend the time for filing briefs and evidence, he has no power to extend the 90 day deadline for making the arbitration demand (R 200).

Cargill did not comply with the NCPA's 90 day deadline for demanding arbitration. Cargill did not attempt to assert a right to arbitration until 262 days after it received written notice of the Parsleys' claim and 191 days after the Parsleys filed suit. 7-A. The Fifth Circuit correctly held that Cargill was "certainly in a better position than the Parsleys, who are not members [of the NCPA], to know that a member desiring arbitration must demand it in a timely fashion" and that "Cargill has no excuse for its failure to demand arbitration timely." 7-A.

The Fifth Circuit's decision is consistent with other cases on this issue. Generally, when the agreement sets a deadline to demand arbitration, a party's failure to make a timely demand bars any right to arbitration. *See, e.g., Bickerstaff v. Frazier,* 232 So.2d 190 (Dist. Ct. App. 1970); *Southern Motels Investment Corp. v. Tower Contr. Co., Inc.,* 174 So.2d 174 (La. Ct. App. 1965); *Sucrest Corp. v. Chimo Shipping, Ltd.,* 236 F. Supp. 229, 230 (S.D. NY 1964). The issue of what triggers the time period to demand arbitration has arisen in securities cases. Agreements between investors and brokerage firms frequently incorporate by reference the arbitration rules of the National Association of Security Dealers, Inc., the New York Stock Exchange, or the American Stock Exchange. The rules of each of these associations contain a provision that "[n]o dispute, claim, or controversy shall be eligible for submission to arbitration . . . where six years shall have elapsed from the occurrence or event

giving rise to the act or dispute, claim or controversy." *See e.g., Paine Webber, Inc. v. Hartmann*, 921 F.2d 507, 509 (3rd Cir. 1990). In a number of cases, courts have held that the date of purchase of the security in question triggered the running of the six year period for arbitration, and a party's failure to demand arbitration within such six year period barred the party's right to arbitration. *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992); *Roney & Co. v. Kassab*, 981 F.2d 984 (6th Cir. 1992); *Paine Webber, Inc. v. Hartmann*, 921 F.2d 507 (3rd Cir. 1990); *First of Michigan Corp. v. Swick*, 894 F. Supp. 298 (E.D. Mich. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ohnuma*, 613 N.Y. Supp. 2d 811 (1994); *Prudential Bache Securities, Inc. v. Archard*, 579 N.Y. Supp. 2d 890 (1992).

In short, Cargill violated the mandatory deadline of its own trade association rules for demanding arbitration, and therefore had no right to force the Parsleys out of court and into arbitration. The Fifth Circuit's denial of arbitration is correct.

CONCLUSION

Contrary to what Cargill says, the Texas Supreme Court's application of the Federal Arbitration Act in *EZ Pawn Corporation v. Mancias* has no impact on the Fifth Circuit's decision for two reasons: the two cases are distinguishable, and even if they were not, the Fifth Circuit is not required to give any effect to a state court's application of a federal statute. Furthermore, as the Fifth Circuit stated:

> Cargill has no one to blame but itself for its predicament. There may be circumstances in which the public policy favoring arbitration could be the factor that pulls chestnuts out of the fire, but that policy cannot magically resurrect Cargill's chestnuts from these cold, dead ashes 191 days after the fire burned out. 8-A.

The Parsleys request the Court to deny Cargill's petition for a writ of certiorari and request the general relief at law or in equity they are entitled to receive.

Respectfully submitted,

M. KEITH DOLLAHITE
(State Bar No. 05958550)
HARDY & ATHERTON, P.C.
909 ESE Loop 323
Suite 750
Tyler, Texas 75701
(903) 561-8400
(903) 561-8228 (Facsimile)
Attorneys for Respondents.